

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HERITAGE REALTY MANAGEMENT,)
INC.,)
Plaintiff)

v.)

CIVIL ACTION NO. 04-333 ERIE

JOHN ALLIN d/b/a ALLIN)
COMPANIES and SNOW MANAGEMENT)
GROUP,)
Defendant)

v.)

SYMBIOT BUSINESS GROUP, INC.,)
et al.,)
Third-Party Defendants)

PRETRIAL MOTIONS
(COURT ORDERS)

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Courtroom C, U.S. Courthouse, Erie,
Pennsylvania, on Wednesday, June 21, 2006.

APPEARANCES:

NEAL R. DEVLIN, Esquire, appearing on behalf of
the Plaintiff.

CRAIG A. MARKHAM, Esquire, appearing on behalf
of the Defendant.

DANIEL J. PASTORE, Esquire, appearing on behalf
of the Third-Party Defendants.

Ronald J. Bench, RMR - Official Court Reporter

EXHIBIT

A

1 P R O C E E D I N G S

2
3 (Whereupon, the following excerpt of proceedings
4 occurred on Wednesday, June 21, 2006.)

5
6 (Recess from 11:03 a.m.; until 11:12 a.m.)

7
8 THE COURT: These are going to be orders.

9 ORDERS

10 Presently pending before the court are cross-motions
11 for summary judgment filed by the plaintiff and defendant.
12 The background is well-known to the parties, so I am somewhat
13 abbreviated here in sketching out the operative facts. But,
14 basically, the parties entered into a contract on
15 October 12, 2004. Under the terms of which Allin agreed to
16 "provide all services required to manage, supervise and
17 assure," the performance of all "snow and ice piling, snow
18 blowing, shoveling, salting, sanding and snow and ice removal
19 operations." On October 13, 2004, the record reflects that
20 Heritage paid an initial installment to Allin in the amount of
21 \$340,482.90. Section 17 of the contract authorized Heritage to
22 "terminate the contract by giving Allin 10 days written
23 notice." Heritage had the right under the contract to
24 terminate it if Allin was "in default with respect to any of
25 its obligations or without any cause whatsoever." The contract

1 further provided that in the event of a termination, Allin was
2 to be paid "for all work or services performed and equipment
3 and materials supplied to the date of termination."
4 On November 3, 2004, Heritage issued a written notice to Allin
5 that it was terminating the contract and demanded the return of
6 \$340,482.90.

7 The plaintiff argues that it is entitled to summary
8 judgment on the basis that it terminated the contract with
9 Allin before any work was performed. And it is entitled to
10 reimbursement in the full amount of the money that it paid out.
11 Plaintiff also contends that Allin breached the contract when
12 it entered into third-party contract with Symbiot. The
13 defendant counters that under the plain language of Section 17
14 of the contract, the plaintiff is not entitled to seek a refund
15 from the defendant in any amount if the contract is terminated.
16 And, alternatively, the defendant argues that there are
17 material issues of fact as to the amount and value of work and
18 services which it performed and as a result of which would be
19 entitled to an offset.

20 Paragraph 17 of the contract provides in pertinent
21 part:

22 "Heritage shall have the right to terminate this
23 agreement by giving contractor 10 days written notice in the
24 following events: (a) Contractor is in default with respect to
25 any of its obligations under this agreement; (b) If any

1 property or properties covered by this contract scheduled to be
2 sold; (c) Without any cause whatsoever, provided, in all such
3 events, Heritage shall pay contractor for all work or services
4 performed and equipment and materials supplied to the date of
5 termination."

6 As stated in Steuart v. McChesney, 498 Pa. 45:

7 "It is well established that the intent of the
8 parties to a written contract is to be regarded as being
9 embodied in the writing itself. And when the words are clear
10 and unambiguous, the intent is to be discovered only from the
11 expressed language of the agreement." Citing cases. "When a
12 written contract is clear and unequivocal, its meaning must be
13 determined by its contents alone. It speaks for itself and a
14 meaning cannot be given to it other than that expressed. When
15 the intention of the parties is clear, there is no need to
16 resort to extrinsic aids or evidence." At page 49.

17 It's also Hornbook law that "when there has been a
18 breach of contract, damages are awarded in order to place the
19 aggrieved party in the same position he would have been had the
20 contract been performed. The theory behind this philosophy is
21 based on an attempt to make the non-breaching party whole
22 again, not to provide him a windfall. That's Northeastern
23 Vending Co. v. PDO, Inc., 414 Pa. Supra. 200 (1992).

24 Having carefully considered the matter and
25 specifically subparagraph C in Section 17 of the contract,

1 and after oral argument, I am of the view that that particular
2 provision of the contract is clear and unambiguous within the
3 meaning of the previously-described cases. In other words, if
4 the contract is terminated during a given year, Heritage's
5 obligation is to pay "for all work or services performed and
6 equipment and materials supplied to the date of termination."
7 There is no indication in the plain language of the contract,
8 in fact, in my view, it would be nonsensical to read into it a
9 provision which, in essence, would require Heritage to forfeit
10 in its entirety any installment payment made under the contract
11 regardless of the amount of work that had been performed.
12 Otherwise stated, that interpretation would create a windfall.

13 That said, however, I'm of the opinion that there
14 are material issues of fact as to the nature, value and perhaps
15 timing of services performed by Allin relative to the issue of
16 offset, such that summary judgment is inappropriate.
17 Consequently, the plaintiff's motion for summary judgment is
18 denied.

19 And largely for the same reasons that I just
20 articulated, the defendant's summary judgment, cross-motion for
21 summary judgment, is denied.

22 There is also pending before the court a motion to
23 strike under Rule 14(a). Motion to strike that is on behalf of
24 Symbiot Business Group. In determining whether a motion to
25 strike should be granted, the court considers, among other

1 things, the prejudice to the plaintiff, the prejudice to the
2 third-party defendant, the reasons for the delay and whether
3 the joinder would delay or complicate the trial. United States
4 v. New Castle County, 111 F.R.D. 628 (D.Del. 1986).

5 Examining each of those factors, I find, number one,
6 that given the stage of this case and the fact that we are, as
7 between the original plaintiff and the original defendant, we
8 are within striking distance of trial, the plaintiff would be
9 prejudiced by a delay. Because it would inevitably require
10 additional discovery for Symbiot to come up to speed. The
11 third-party defendant, Symbiot, even if I were to push the
12 entire case forward, would be prejudiced in a way that could
13 not really be remedied, in that it had not been a participant
14 in all of the discovery that had gone before. Thirdly, given
15 the nature of the theory of joinder, although, this isn't a
16 major point and Symbiot could have been joined at any time,
17 particularly at an earlier point in time. And, finally, it
18 seems to me, the joinder of Symbiot not only would delay the
19 trial, for reasons that I've just indicated, namely, the need
20 to extend discovery, but in my view would complicate the trial
21 because the battle between Allin and Symbiot grows out of an
22 entirely different factual matrix and legal theory than the
23 battle between Heritage and Allin. So the motion to strike is
24 granted.

25 With respect to the motion to consolidate the

1 actions, in my view the consolidation of the actions is
2 inappropriate because these cases, as was pointed out in the
3 papers, are really at opposite ends of the litigation time
4 line. And to join them now at the hip would unduly delay, and
5 I think inappropriately delay the earlier case.

6 So the motion to strike -- to clarify then, if I
7 didn't already say this, the summary judgment motions are
8 denied; the motion to strike is granted; and the motion to
9 consolidate is denied.

10

11 (Whereupon, at 11:25 a.m., the proceedings were
12 concluded.)

13

14

- - -

15

16

17

18

19

20

21

22

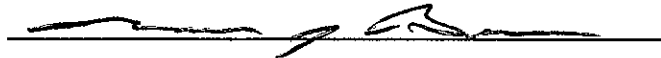
23

24

25

C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

A handwritten signature in dark ink, appearing to read 'Ronald J. Bench', is written over a horizontal line.

Ronald J. Bench